

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 07-125

In the Matter	)	EB Docket No. 07-147
)	
PENDELTON C. WAUGH, CHARLES M.	)	File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC.	)	NAL/Acct. No. 200732080025
)	
Licensee of Various Site-by-Site)	
Licenses in the Specialized Mobile	)	FRN No. 0003769049
Radio Service)	
)	
PREFERRED ACQUISITIONS, INC.)	
	)	FRN No. 0003786183
)	
License of Various Economic Area)	
Licenses In the 800 MHz Specialized)	
Mobile Radio Services)	
)	

To: The Commission

PETITION TO INTERVENE AND REVOKE LICENSES

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SUMMARY

Petitioner Toshiaki Saito seeks to intervene in EB Docket No. 07-147 to oppose the September 29, 2009, settlement agreement between the Enforcement Bureau, Preferred Communication Systems, Inc., Preferred Acquisitions Inc., Charles M. Austin, and Jay R. Bishop, and to request the revocation of the licenses at issue. The settlement agreement is unquestionably not in the public interest as it leaves the licenses in the hands of parties that have made misrepresentations and lacked candor before the Commission, have not fully disclosed the interests of parties, and failed to operate the licenses at issue. Furthermore, the settlement leaves unresolved the issue of whether there was an unauthorized transfer of control at or about the time Auction 34 occurred.

In sum, the settlement agreement resolves few if any of the important issues outlined in the Order To Show Cause. Mr. Waugh's untimely death likewise does nothing to remedy wrongs that have already occurred. Austin's essential role of implementing Waugh's business plans, Austin's co-creation of the deceptive trust agreement, his lack of candor regarding Waugh's significant role in the company, and his failure to make operational use of the licenses, continues to create a serious concern that the licensees will continue to lack candor in future dealings with the Commission.

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To: The Commission

PETITION TO INTERVENE AND REVOKE LICENSES

TOSHIAKI SAITO ("Petitioner"), by and through his attorneys, Ashford & Wriston a Limited Liability Law Partnership LLP, hereby seeks to intervene in EB Docket No. 07-147 to oppose the Settlement Agreement between the Enforcement Bureau and Preferred Communications Systems, Inc. and Preferred Acquisitions, Inc. (collectively, "Preferred"), Charles Austin and Jay Bishop. Petitioner further requests that the Commission revoke the licenses Preferred acquired in Auction 34 in August of 2000. Revocation is in the public interest because Preferred made misrepresentations and lacked candor before the Commission and failed to disclose the interest of a party.

Petitioner requests that the Commission allow intervention under Rule 1.223(c),¹ or alternatively submits this petition as an informal request for Commission action under Rule 1.41.²

Petitioner was an investor in wireless licenses who was defrauded by Pendleton Waugh (“Waugh”) and Waugh’s business associates. Petitioner obtained a nondischargeable judgment of over one million dollars against many of the wireless communications-related companies Waugh founded or co-founded.³ Petitioner has submitted information that he believes will assist the Commission in the determination of issues of concern to the public interest. Petitioner would have filed a motion to intervene earlier, but as an elderly layperson not regularly updated regarding FCC proceedings, Petitioner was unaware of the ongoing proceeding until after the prescribed time for filing under Rule 1.223(a). Although Petitioner has been treated as a party to these proceedings since his 2010 filings, Petitioner requests confirmation of his standing to appear and oppose the pending settlement agreement.

¹ See Mr. Saito’s Affidavit attached.

² Alternatively, Petitioner requests that this petition be accepted as Motion To Deny under Rules 1.45(a) and 1.939, with Rule 1.3 being exercised by the Commission to waive the Rule 1.2108’s 10-day deadline for filing petitions. The grounds for Petitioner’s status as a party were previously set forth in *Mr. Toshiaki Saito’s Memorandum Regarding The Enforcement Bureau’s Statement Of Clarification*, October 28, 2010.

³ *Deposition of Pendleton C. Waugh (“Deposition of Waugh”),* January 26, 2009, 4:6-16.

I. INTRODUCTION

On September 25, 2009, a Settlement Agreement was approved that would require the Enforcement Bureau to “waive [its] right to a hearing on the issues which are designated in the Order To Show Cause,” but that would “not constitute an admission by PCSI, PAI, Charles M. Austin, and Jay R. Bishop of any violation. . . from actions or admissions described in the Order to Show Cause”⁴ Essentially, it would allow Preferred to make misrepresentations and lack candor before the Commission and not disclose a part of interest, without any fault, and would leave undetermined whether there was an “unauthorized transfer of control” at or about the time Preferred participated in Auction 34 in August, 2000, acquiring valuable Federal Communications Commission (“FCC”) licenses.⁵ Neither the proposed settlement nor Waugh’s untimely death resolve these questions,⁶ and although Preferred may no longer have a reason to implement a potentially prohibited trust arrangement or misrepresent an employee as a consultant, Preferred’s lack of candor before the Commission raises a serious concern whether it “will be truthful in future dealings.”⁷

⁴Settlement Agreement (“Settlement Agreement”), August 28, 2009, 5:12, 5:10.

⁵ There were two groupings of claims in the *Order To Show Cause And Notice Of Opportunity For Hearing* (“*Order To Show Cause*”), July 20, 2007, one “concerning an unauthorized transfer of control and undisclosed party in interest,” and one regarding a “misrepresentation and lack of candor.” *Transcript Of Proceedings Of Hearing*, (“*Hearing Transcript*”) September 9, 2009, 100: 8-14.

⁶ They do, however, render moot the issue of whether there could be a future unauthorized transfer involving Waugh.

⁷ *Policy Regarding Character Disqualifications in Broadcast Licensing, Report, Order, and Policy Statement*, 102 FCC 2d 1179, 1210-11 ¶ 60 (1986).

II. WAUGH AND AUSTIN'S COMPANIES HAVE A HISTORY OF PUSHING THE LEGAL LIMIT RATHER THAN COMPLYING WITH THE COMMISSION'S STANDARD OF CANDOR AND FORTHRIGHTNESS

Preferred President and CEO Charles M. Austin ("Austin") and his "mentor"⁸ Waugh (and their companies) did not comply with the "high standard of candor and forthrightness" required of FCC licensees⁹ and are consequently "thoroughly disqualif[ied] . . . for the public trust embodied in a Commission license."¹⁰ In other cases "[w]here an applicant has knowingly attempted to mislead the Commission on an underlying matter of decisional import, complete disqualification of such an untrustworthy licensee or applicant has consistently resulted."¹¹

Austin, Waugh's established business pattern of deception¹² and lack of candor began at Express Communications, Inc. ("Express"), where Waugh and

⁸ *Deposition of Charles M. Austin*, January 5, 2009, 26:7-12.

⁹ *Order To Show Cause*, 14:34 (citing *WHW Enterprises v. FCC*, 753 F.2d, 1139 (D.C. Cir. 1985)).

¹⁰ *See Id.* at 1132; *RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981).

¹¹ *Order To Show Cause*, 14:34 (citing *Contemporary Media, Inc. v. FCC*, 214 F.3d 187 (1998); *Catoctin Broadcasting Corp. of New York*, 2 FCC Rcd 2126, 2136-38 (Rev. Bd. 1987); *TeleSTAR, Inc.*, 2 FCC Rcd 5 (Rev. Bd. 1987); *Mid-Ohio Communications, Inc.*, 104 FCC 2d 572 (Rev. Bd. 1986); *Bellingham Television Associates, Ltd.*, 103 FCC 2d 222 (Rev. Bd. 1986)).

¹² "Intent to deceive . . . can also be inferred when the surrounding circumstances clearly show the existence of an intent to deceive." *Order to Show Cause*, 15:35 (citing *American International Development, Inc., Memorandum Opinion and Order*, 86 FCC 2d 808, 816 n.39 (1981), *aff'd sub nom. KXIV, Inc. v. FCC*, 704 F.2d 1294 (D.C. Cir. 1983)).

Austin first met.¹³ There, Waugh became involved with member managed limited liability companies (“MMLLCs”), claiming that they were not governed by securities laws.¹⁴ The SEC disagreed, resulting in Waugh pleading guilty to “one count of conspiracy to structure financial transactions to evade securities and banking reporting requirements,” his disbarment, and even incarceration.¹⁵

After Waugh was forced to leave Express as part of his plea agreement,¹⁶ he came up with an idea to conceal his participation in Auction 11. Waugh shared this plan with Austin, who then formed One Source Communications (“One Source”) for the purpose of concealing Waugh’s involvement from the Commission.¹⁷ This was necessary because if the full extent of Waugh’s involvement and control was known by the Commission they would likely be precluded from holding licenses.¹⁸ Waugh and Austin therefore concocted a compensation arrangement that would place voting shares of company stock in

¹³ Austin was under the direct supervision of Waugh as an employee at Select Digital, technically considered “a marketing arm for Express.” *Deposition of Charles M. Austin* (“*Deposition of Austin*”), January 5, 2009, 15:6-11, 17:1-2.

¹⁴ *Deposition of Waugh*, 2009, 11:9-19 (Waugh fought characterization of MMLLCs as securities in state administrative hearings, SEC obtained default judgment); 113:8-15 (Mr. Jay Bishop (“Bishop”) litigated issue of whether interest in an general partnership was a security and lost in the Ninth Circuit).

¹⁵ *Order To Show Cause*, 3:2.

¹⁶ *Order To Show Cause*, 3:2.

¹⁷ *Deposition of Waugh*, 77:3-7.

¹⁸ Commission’s character qualifications require consideration of felony convictions. *Order To Show Cause*, 16:43.

a trust, which shares would eventually be sold with the proceeds going to Waugh.¹⁹

One Source was dissolved before it could foist this deception upon the Commission in Auction 11. Waugh and Austin, however, did not give up. Waugh subsequently applied the same deceptive trust arrangement at Telecellular, Inc. ("Telecellular").²⁰ Telecellular was co-founded by Waugh in December, 1993,²¹ "about the time [Waugh] was having [his] legal difficulties."²² While working at Telecellular, Waugh orchestrated a plan whereby a separate entity would "buy up [general category] licenses, package them up and sell them to Telecellular,"²³ thus allowing Telecellular to capture the wireless market in Puerto Rico.²⁴ Waugh persuaded Austin and Jay Bishop ("Bishop") to enact the plan, who formed Preferred²⁵ for that purpose. Waugh, Austin, and Bishop verbally agreed that Waugh (and presumably Austin and

¹⁹ *Deposition of Waugh*, 77-78.

²⁰ *Deposition of Waugh*, 77:1-2 ("So I said I'm going to become a consultant"); 78:10-18.

²¹ *Deposition of Waugh*, 69:13-19.

²² *Deposition of Waugh*, 70:10-12.

²³ *Deposition of Waugh*, 89:1; *Deposition of Austin*, 152:2-5 ("we'd been talking to Pen in 1997 when he was working with Telecellular, and the idea came about to create an entity to go after the licenses.")

²⁴ *Deposition of Austin*, 196:4-5 ("an opportunity to wrap up the island").

²⁵ *Deposition of Waugh*, 87:7-11.

Bishop each) would receive “a third of the sales proceeds,”²⁶ and that each would be paid equal amounts of \$7,000/month.²⁷ Possibly in lieu of this compensation arrangement, Austin and Waugh at some point agreed to implement Waugh’s previously mentioned deceptive trust arrangement.²⁸

Waugh’s plan was unsuccessful, however, because Telecellular refused to negotiate with Preferred to buy the licenses and sued Preferred instead. To make matters worse, Preferred lost about 110 licenses due to an adverse Commission decision,²⁹ “drop[ping Preferred] below the point where they could have a viable footprint in Puerto Rico.”³⁰ Rather than sell the remaining licenses to Nextel or some other party, Waugh then came up with the idea of secretly participating in Auction 34 in order to acquire more licenses and gain a viable network footprint. Waugh shared this idea with Austin, who agreed to pursue it.³¹

²⁶ *Deposition of Waugh*, 89:4-6; *Id.* at 204:21 (“when Preferred had acquired these licenses in Puerto Rico and/or elsewhere, and had sold them to someone, we were to – Austin and Bishop and I were going to split the sales proceeds.”)

²⁷ *Deposition of Waugh*, 178:5-14 (“The agreement we had originally, back in 1999, was that we were supposed to be paid \$7,000 a month, and Austin was going to get that amount, and Bishop was going to get that amount, and I was going to get that amount.”)

²⁸ *Deposition of Austin*, 175:1-2 (“verbal agreement on the stock, that stock needed to go into a trust”); *Deposition of Waugh*, 211:15-20 (I understood that we had an agreement, and the agreement was that, upon the formation of a voting trust, and having Hebrank as a trustee, the company was going to issue a certain number of shares to the voting trust.”)

²⁹ *Deposition of Waugh*, 170:13-15.

³⁰ *Deposition of Waugh*, 175:16-18.

³¹ *Deposition of Waugh*, 172:5-8.

Preferred submitted an Application to Participate in Auction 34 ("Short Form") and later an FCC Form 602, Ownership Disclosure Information for the Wireless Telecommunications Services Form ("Ownership Disclosure Form"), which both represented to the Commission that Austin was Preferred's 100% shareholder,³² despite the fact that he apparently owned 77.78% of the voting stock, while Jerry Setka owned 19.9%³³ and several other parties owned smaller shares, and despite Austin and Waugh's verbal sub rosa agreement to transfer 800,000 shares into Waugh's trust³⁴ (for which Austin had even selected the trustee³⁵). Preferred obviously lacked candor by not disclosing to the Commission all the parties owning interests in the company, including Waugh's trust arrangement.³⁶

III. INTENT TO DECEIVE CAN BE INFERRED FROM AUSTIN'S EXPLANATIONS

Austin's explanations surrounding Waugh's undisclosed interest in Preferred demonstrate a lack of candor before, and intent to deceive, the Commission. While the Short Form disclosed that Preferred had agreed to

³² *Order To Show Cause*, 5:11 (the Order To Show Cause states that PAI represented that Austin held 100% of PCSI's "common shares" but the Short Form appears to state Austin owned 100% of PCSI's "voting stock")(see *Preferred Acquisitions Inc.*, FCC Form 175, dated July 17, 2000); 6:14.

³³ *Deposition of Austin*, 74:1-8.

³⁴ *Deposition of Austin*, 175:19-22.

³⁵ *Deposition of Austin*, 173:16-17.

³⁶ It is not clear whether Waugh utilized a trust arrangement at Smartcom, LLC, ("Smartcom") a company he formed to handle "investor relations and marketing for Preferred," or later when Waugh disclosed to Austin a business plan to participate in Auction 73, and Austin formed Venturetel for that purpose. *Deposition of Austin*, 216:21-217:10.

issue additional shares “conditioned upon receipt of prior FCC approval,”³⁷ Preferred apparently issued “a stock certificate” prior to submission of the Short Form without obtaining such FCC approval first.³⁸ Preferred claimed that this stock certificate was ineffectual, possibly because Waugh did not sign it, but not apparently because prior FCC approval had not been obtained first. Thus, the stock certificate, regardless of whether it was effectual when the Short Form was submitted, demonstrates that Preferred attempted to issue a significant amount of stock to Waugh in a license-possessing company without receiving prior FCC approval.³⁹

After coming under Commission scrutiny, Austin admitted that the verbal agreement with Waugh “probably should have been in writing,”⁴⁰ but his reluctance to record it demonstrates an intent to hide the arrangement from the Commission. Austin further confusingly claimed “he wanted to file [a transfer of control] application prior to Auction 34”⁴¹ but did not because Waugh’s receipt of the trust was tied to Bishop having one, and Bishop refused apparently because he wanted to sell the licenses to pay for his ongoing legal proceedings.⁴² It is not completely clear, however, why it was necessary for

³⁷ *Order To Show Cause*, 5:11.

³⁸ *Order To Show Cause*, 9:21.

³⁹ *Order To Show Cause*, 5:11.

⁴⁰ *Deposition of Austin*, 184:18-20.

⁴¹ *Deposition of Austin*, 177:19-20.

⁴² *Deposition of Austin*, 178:3-8, 19-20 (“he needed cash”).

Bishop to have a trust in order for Waugh to have one, especially since years later Austin admitted that the fact that “Bishop didn’t sign the trust” was no longer an impediment to Waugh receiving his trust.^{43,44}

While Austin’s unnecessary trust requirements, failure to file a transfer of control application, and strictly-verbal agreement might be explained if, rather than to deceive the Commission, Austin had a plan to take advantage of Waugh (and not honor the promise), it in fact appears that both Austin and Waugh expected that their verbal agreement would be fulfilled. For example, an irrevocable trust agreement between Raymond A. Hebrank and Waugh was apparently later reduced to some type of written form, and was amended and restated on April 14, 2005.⁴⁵ Also, Waugh’s willingness to live “[v]ery meagerly”⁴⁶ with little or no pay for several years, calculating that if “the

⁴³ *Deposition of Austin*, 227:8-11.

⁴⁴ While Bishop “saw the writing on the wall” regarding his imminent felony conviction, this still does not explain why Bishop having a trust would be *required* in order for Waugh to have one. *Deposition of Austin*, 178:7. It is conceivable that the tying arrangement was preferred because if Bishop did not agree to a trust and instead coerced a sale of the licenses then Waugh’s trust might be rendered obsolete, but it seems in any event that Bishop did not have the ability to force such a sale because mega-investor Patel did not apparently want Bishop involved in the company. *Deposition of Waugh*, 212:6-8. It may be that having two trusts would better hide Waugh’s interest in the company from the Commission.

⁴⁵ Although it may have expired in sometime in 2010. *Enforcement Bureau’s Request For Admission Of Facts And Genuineness Of Documents To Pendleton C. Waugh*, September 5, 2007, 5:25.

⁴⁶ *Deposition of Waugh*, 175:22; *Deposition of Waugh*, 173:3-11 (Waugh also lived “on very little money” from 1996-2003).

company did what [he] considered it should do, [he'd] end up doing very well,"⁴⁷ corroborates the existence of the agreement and an expectation that it would be honored. Austin, furthermore, stated that he "stands behind the verbal commitment that [he] made to [Waugh] years ago."⁴⁸

Austin indicated, however, that he might not fulfill Waugh's agreement since the "trust is still not ready to receive such stock," "because [Waugh] hasn't paid his trustee."⁴⁹ Like the tying requirement (that Bishop have a trust in order for Waugh to have one), this requirement that the trustee be paid in order to honor the verbal agreement does not seem to square away with the fact that Austin would apparently compensate Bishop in the form of stock or warrants (reduced from 800,000 shares to 250,000) despite Austin never having appointed a trustee for Bishop's trust, much less paid one.⁵⁰

IV. PREFERRED'S NAME FOR WAUGH'S TRUST WAS MISLEADING

Licensees also lacked candor by presenting to the Commission the Short Form that deceptively referring to Waugh's trust in the name of his trustee (i.e., the "Raymond A. Hebrank Irrevocable Voting Trust")⁵¹ rather than candidly disclosing Waugh's interest. Waugh's response that there was nothing wrong,

⁴⁷ *Deposition of Waugh*, 178:15-17; see also *Deposition of Waugh*, 164:2-3 ("and I would end up owning, through a voting trust a certain percentage of the company.")

⁴⁸ *Deposition of Austin*, 225:22-226:2.

⁴⁹ *Deposition of Austin*, 226:13-18.

⁵⁰ *Deposition of Austin*, 228:6-11.

⁵¹ *Order To Show Cause*, 5:11.

i.e., illegal, with the trust exemplifies the crux of Preferred's mindset in dealings with the Commission—providing the bare minimum amount of information to be legal is not synonymous with satisfying the FCC's standard of candor and forthrightness.⁵² The name for Waugh's trust is even more misleading when considered in the Short Form's context, which refers to Bishop's trust as "The Bishop Irrevocable Voting Trust"--in the name of the beneficiary rather than the trustee.⁵³

Austin's explanations for the misleading names of the trusts are unpersuasive for several grounds. According to Austin, Preferred approved the name of Waugh's trust because "Pen had already chosen the name or we'd already had a trustee for that" and Preferred's attorney said that "you need to put the name of the actual entity that's going to hold the stock."⁵⁴

It does not appear to be the case, however, that "the actual entity" holding the stock had to be named after the trustee. Preferred apparently could have followed counsel's advice and still named the actual entity after its beneficiary, Waugh. Furthermore, it is not clear that there was an "actual entity" that was going to hold stock entitled: "The Bishop Irrevocable Voting

⁵² *Transcript of Proceeding*, September 9, 2009, 207:12-19 ("[T]here wasn't any requirement that Preferred disclosed who beneficiaries of voting trusts were. . . There wasn't anything wrong with setting up a voting trust.")

⁵³ *Order To Show Cause*, 5:11.

⁵⁴ *Deposition of Austin*, 185:17-22

Trust.” Rather, Austin “just arbitrarily assumed that, you know, we’d call it the Bishop trust.”⁵⁵

If the actual entity holding the stock did have to be named after the trustee, then that would have apparently meant that Bishop (or his wife) would be the trustee of his trust.⁵⁶ This trust would obviously not have met the “arm’s length”⁵⁷ requirement since Bishop as trustee would then be representing 800,000 voting shares, even if not technically as the owner.^{58,59} While Bishop stated in an email that “I do not currently, nor have I ever, owned any stock in [PCSI],”⁶⁰ he omitted disclosing whether he owned any *interest* in stock or whether at any point he controlled shares.

Austin’s explanation that Preferred approved the name of the trust because “Pen had already chosen it”⁶¹ is problematic because, if true, it

⁵⁵ *Deposition of Austin*, 186:1-2

⁵⁶ If the name of Bishop’s trust was selected with the intention to later choose an independent trustee, then the two names of the trusts in the Short Form, one being named after the trustee and the other after the beneficiary, are undoubtedly deceptive.

⁵⁷ *Deposition of Austin*, 175:6.

⁵⁸ *Deposition of Austin*, 175:4-8 (“I picked the individual [as trustee for Waugh’s trust]. . . that I would want representing that block of stock.”).

⁵⁹ Regardless of the fact that it was not until 2001 (after the Short Form was submitted) that Bishop was apparently convicted of felonies, Bishop controlling stock in Preferred would probably have been important information to provide to the Commission in detail, due to his connection with Continental Wireless Cable Television, Inc. (“Continental”). *Order To Show Cause*, 4:6-7.

⁶⁰ *Prehearing Conference*, September 12, 2007, 5:21-6:1.

⁶¹ *Deposition of Austin*, 185:20-21.

demonstrates Waugh's influence over important company matters like making representations to the Commission in applications for FCC licenses.

Furthermore, if true, such a deferral by Austin to Waugh is inconsistent with Austin's claimed decision-making practices. When Telecellular, for example, sued Preferred instead of negotiating for desired licenses, Waugh's very liberty was threatened due to alleged violations of his probation,⁶² yet Austin and Bishop apparently refused to bow to Telecellular's demands, leading Waugh to later say that "[Austin and Bishop] didn't give a rat's behind about my butt."⁶³ Later at Preferred when Waugh suggested Austin fire everyone in a California office except for two employees, Austin did the exact opposite.⁶⁴ Then, in a heated exchange Waugh apparently strongly insisted that Austin heed "major financial backer"⁶⁵ Chandu Patel's ("Patel") wishes to not "spend more than 23 or 24 million dollars" in Auction 34, yet Austin spent 32 million.⁶⁶

Austin's blaming defects in the Auction 34 application on "corporate secretary"⁶⁷ Michelle Bishop⁶⁸ is also inconsistent with his statement that he

⁶² *Deposition of Waugh*, 96:16-17.

⁶³ *Deposition of Waugh*, 94:5-9.

⁶⁴ *Deposition of Austin*, 121:2-12.

⁶⁵ *Deposition of Austin*, 38:21-22. Patel was originally a client of Express. *Deposition of Waugh*, 168:13-15.

⁶⁶ *Deposition of Waugh*, 195:12-13, 19-20; 198:8-13.

⁶⁷ *Deposition of Waugh*, 146:8.

⁶⁸ *Deposition of Austin*, 201:1-3; 70:4-9.

“has at all relevant times . . . had full authority and responsibility with respect to the preparation and filing of FCC submissions by and on behalf of PCSI and PAI.”⁶⁹ It is also inconsistent with Austin’s business duties, which according to Austin have stayed basically the same since the company started:⁷⁰ “[during an auction,] bidding . . . working with attorneys, drafting and preparing legal documents, subscription documents, offering documents.”^{71,72} Furthermore, it appears Mr. Austin signed the Auction 34 application to certify truthfulness and completeness of ownership information Preferred had already submitted.⁷³

The misleading information regarding the trusts in Preferred’s Auction 34 application, including the deceptively named trusts and Austin’s unsatisfying explanations, demonstrate at the very least a lack of candor before, and an intent to deceive, the Commission.

⁶⁹ *PCSI’s Response To The Enforcement Bureau’s First Set Of Written Interrogatories*, December 17, 2007, 12:35.

⁷⁰ *Deposition of Austin*, 152:2-5 (“But, in terms of did my role change in terms of, you know, responsibility for everything and signing for everything, no. I mean, that’s been consistent throughout.”)

⁷¹ *Deposition of Austin*, 108:16-22.

⁷² Austin’s explanation that filing was Michelle’s responsibility because of her familiarity with the Internet in 2000 is somewhat questionable considering his sudden familiarity in 2001. *Deposition of Austin*, 109:4-6; 144:16-19.

⁷³ See *Preferred Acquisitions Inc., FCC Form 601, FCC Application for Wireless Telecommunications Bureau Radio Service Authorization*, September 27, 2000, page 4.

V. PREFERRED MISREPRESENTED WAUGH'S WORK RELATIONSHIP

In addition to misrepresenting stock ownership interests to the Commission, Preferred misrepresented Waugh's work relationship,⁷⁴ which appears to be that of an employee rather than a consultant. Waugh provided the impetus to create Preferred (by presenting to Austin the business plan to purchase licenses to sell to Telecellular) and was substantially involved in Preferred's business operations for many years.⁷⁵ Waugh worked for several years directly in Preferred's headquarters, "across the hall from Austin."⁷⁶ Waugh drafted memoranda of company business stratagems and Austin "finished many of Waugh's projects."⁷⁷ When a law firm needed to be contacted, Austin would sometimes "set up Pen to work and to bring them up to speed."⁷⁸ While Waugh may or may not have recommended that Preferred retain attorney David Kaufman ("Kaufman"),⁷⁹ he was "involved . . . in the process" of dealing with Kaufman in the "initial filings,"⁸⁰ he at least once "look[ed] over [Michelle's shoulder . . . [to] catch any mistake[s]" in the

⁷⁴ Waugh may have had a similar work relationship at Telecellular, a company Waugh co-founded, where he referred to himself as a consultant despite working there "80 or 90 percent of [his] time," with the rest of his time being dedicated to Preferred. *Deposition of Waugh*, 90:4-6.

⁷⁵ *Deposition of Waugh*, 85-88; see also footnote 17.

⁷⁶ *Deposition of Waugh*, 232:13-15.

⁷⁷ *Deposition of Austin*, 96:1-9.

⁷⁸ *Deposition of Austin*, 142:17-143:4.

⁷⁹ *Deposition of Austin*, 134:16-22. Waugh claimed that Austin found Kaufman, however. *Deposition of Waugh*, 231:10.

⁸⁰ *Deposition of Austin*, 135:2-7.

applications for Auction 34, and he listened into a conversation that Michelle and Kaufman were having.^{81,82} Waugh also drafted a “major filing”⁸³ for Preferred, and assisted in advertising for employment positions at Preferred’s marketing office⁸⁴ in Escondido.⁸⁵

Although Austin claimed that Preferred’s receipt of the first and second LOIs⁸⁶ did not affect its relationship with Waugh,⁸⁷ it was about this time that Waugh left Preferred, only to conduct “investor relations and marketing for Preferred,”⁸⁸ forming Smartcom, LLC. Only in 2008, after several key Preferred investors “read[] . . . over the designation order”⁸⁹ and backed out of Waugh’s

⁸¹ *Deposition of Austin*, 89:1.

⁸² There is a conflict in the depositions, as Waugh claimed that he was in the Palm Springs office when Michelle Bishop and Kaufman actually created the forms that were filed in Auction 34 and that “[e]verybody else was in Puerto Rico” “when the 602 was filed.” *Deposition of Waugh*, 256:2-4. *Id.* at 257:4-6.

⁸³ *Deposition of Waugh*, 228:19.

⁸⁴ *Deposition of Waugh*, 228:15-19; *Id.* at 235:1-2; *Id.* at 239:10-11 (“Matt and I agreed we were going to have a marketing office.”).

⁸⁵ *Deposition of Waugh*, 233:18-234:4.

⁸⁶ *Letter from Hillary S. DeNigro, Chief, Investigations and Hearings Division, Enforcement Bureau, Federal Communications Commission, to Charles M. Austin, President, Preferred Communication Systems, Inc.*, dated December 27, 2006 (“Second LOI”). First LOI was sent June 30, 2006.

⁸⁷ *Deposition of Austin*, 90:19-21.

⁸⁸ See footnote 27.

⁸⁹ *Deposition of Austin*, 221:13-16.

proposal (to Austin) to participate in Auction 73, was Waugh officially “fired” from Preferred.⁹⁰

Austin claimed that Waugh was one of “several consultants [Preferred used] over the years,”⁹¹ yet in reality there were just two.⁹² One of those was Bishop, who “ha[s] not worked as a consultant” for Preferred since 2001.⁹³ Preferred’s relationship with the other consultant, Alex Calderon (“Calderon”), was very different from its relationship with Waugh. For example, Waugh apparently solicited Calderon’s services on Preferred’s behalf, and “got [Matt] to agree to offer Alex a back-end interest in the company.”⁹⁴ Also, Waugh did not “operate any other businesses [besides Preferred]” from January 14, 2000, until October, 2007,⁹⁵ while Calderon “[owned] an engineering firm.”⁹⁶

During their depositions, Waugh and Austin instinctively referred to Waugh as an employee of Preferred and as part of the Preferred team.^{97,98} Also,

⁹⁰ *Deposition of Waugh*, 18:21-22; see footnote 29 (after Waugh presented the plan to participate in Auction 73, Austin formed Venturetel for that purpose).

⁹¹ *Deposition of Austin*, 102:3-9.

⁹² *Deposition of Austin*, 102:14-19.

⁹³ *Prehearing Conference*, September 12, 2007, 6:1-3.

⁹⁴ *Deposition of Waugh*, 188:6.

⁹⁵ *Deposition of Waugh*, 180:3-14.

⁹⁶ *Deposition of Austin*, 103:2-3.

⁹⁷ *Deposition of Austin*, 224:15-21 (Austin: “I’m talking about [Waugh’s] employment—not employment, his consulting or, you know, doing any type of work on behalf of Preferred”); *Deposition of Waugh*, 161:11 (Waugh: “Our [meaning Preferred’s] entire focus”); *Id.* at 175:10-14 (Waugh: “We had money – Preferred had money”); *Id.* at 200:22 (Waugh: “We understood, we

Austin's curious repeated refusals (both before and after Auction 34) to record Waugh's work arrangement with Preferred in writing⁹⁹ demonstrate an intent to hide Waugh's role at Preferred from the Commission. Considering the totality of the circumstances clearly establishes that Waugh was an integral part of Preferred, and his role was not accurately disclosed to the Commission.

VI. THE PUBLIC INTEREST DEMANDS REVOCATION OF PREFERRED'S LICENSES

It is unquestionably in the public's interest to revoke Preferred's licenses. Revoking Preferred's licenses would be in the public interest because the licenses would finally actually be used by the public. Apparently none of Preferred's license have been operational, i.e., available for public use, since at least 2002 (and this appears more due to Austin's design than any other individual).¹⁰⁰ Furthermore, Preferred's repeated practice of installing just

being Preferred . . ."); *Id.* at 96:1-3 (Waugh: "Guskey is our only source—he's Preferred's only source of income. Excuse me.").

⁹⁸ Interestingly, the parties also inadvertently refer to Preferred as Express. *Deposition of Austin*, 44:1-2 ("Chandu, I had met when I was running the marketing office for Preferred—Express . . ."); *Deposition of Waugh*, 111:16-19 ("The SEC came in and basically Preferred was—you know—and excuse me, a Freudian slip—Express was out of business.").

⁹⁹ *Deposition of Waugh*, 176:16-20 (Waugh, prior to 2000, "at various points along the way . . . introduced . . . [to Austin and Chandu] consulting arrangements which never got signed"); *Id.* at 158:1-2 (Waugh (after 2000): "I tried to draft something. I never could get one signed. I never got a consulting agreement signed. . .").

¹⁰⁰ *Deposition of Austin*, 170-172; *Deposition of Waugh*, 244:2-6 ("I made a big push to try and have the company go forward and build and operate systems and . . . Matt and I got into a huge fight."); *Deposition of Waugh*, 247:9-10 ("[Patel] was convinced that Matt wasn't going to build anything" and consequently wanted to sell the licenses.).

enough equipment to preserve the licenses but not enough for operation, demonstrate an intent not to use the licenses at all for the public's benefit.¹⁰¹

Even more importantly, revocation would keep the licenses out of the hands of parties (Preferred) who have lacked candor and made misrepresentations before the Commission, and might easily do so again, regardless of Waugh's passing.

The Commission should send a clear signal to other licensees that it will not tolerate Preferred's "pushing the envelope" of the FCC candor standard. License revocation would provide a much greater deterrent than the \$100,000 "gift" required of Preferred by the settlement.¹⁰² Such auction proceeds could significantly further the public interest, with a portion being used to satisfy the judgments of Preferred's and Preferred's affiliated corporation's creditors, such as Patel and Mr. Toshiaki Saito.

Fashioning such a remedy is well within the Commission's scope of authority¹⁰³ and is aligned with the Commission's Congressional mandate.¹⁰⁴

¹⁰¹ *Deposition of Waugh*, 267:9-15 ("Well, if I gave you the impression that they weren't doing anything towards building and operating a commercial system, that was correct. I understood what they were doing in terms of trying to get the licenses preserved and to meet the minimum construction standard").

¹⁰² Settlement Agreement, 7:29.

¹⁰³ *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("we observe that the breadth of agency discretion is, if anything, at zenith when . . . fashioning . . . remedies.")(cited as "a longstanding principle" in *American Telephone and Telegraph Co. v. F.C.C.*, 454 F.3d 329, 334 (D.C. Cir. 2006)); *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971)(deference to the FCC is "particularly broad when [the] agency is concerned with fashioning remedies."); Michael K. Powell (FCC Commissioner) Before the American Bar Association, April 5, 1998

“[T]here is no dearth of decisions making clear that [the “necessary and appropriate” provisions of Section 309] are not restricted to procedural minutiae.”¹⁰⁵ Many license contracts, furthermore, explicitly recognize the Commission’s authority “to conduct another public auction or assign the License in the event [of license revocation],” and that the licensee in such a case “has no interest in the moneys . . . given to the Commission by a subsequent licensee.”¹⁰⁶ Virtually all courts allow a creditor to have security interest in the *proceeds of the sale* of licenses.¹⁰⁷

Whether the matter can be settled in a court of law should not be an excuse for inaction:

The principles of equity are not to be isolated as a special province of the courts. They are rather to be welcomed as reflecting fundamental principles of justice that properly enlighten administrative agencies under law. The courts may not rightly treat administrative agencies as alien intruders poaching on the court's private preserves of justice. Courts and agencies properly take cognizance of one another as sharing responsibility for achieving the necessities of control in an increasingly complex society

(“The Avagueish, penumbral bounds expressed by the standard of the public interest [leave] wide discretion and [call] for imaginative interpretation.”)(citing Justice Frankfurter).

¹⁰⁴ 47 U.S.C. § 309 (The Communications Act requires the Commission to ensure that all spectrum users serve the “public interest, convenience and necessity.”).

¹⁰⁵ *Niagara*, 379 F.2d at 158.

¹⁰⁶ *Thacker v. FCC*, 503 F.3d 984, 989 (9th Cir. Wash. 2007).

¹⁰⁷ *Opposition To Motion To Strike*, October 26, 2010, p8 (citing *In re Cheskey*, 9 F.C.C.R. 986, 987 & n.8 (Mobile Servo Div. 1994), *MLQ Investors, L.P. v. Pacific Quadracasting, Inc.*, 146 F.3d 746,748-49 (9th Cir. 1998), *In re Beach Television Partners*, 38 F.3d 535,537 (11th Cir. 1994)).

without sacrifice of fundamental principles of fairness and justice.¹⁰⁸

Here, Petitioner was clearly defrauded while engaging in the business of wireless licenses.¹⁰⁹ Tolerating such a clear instance of fraud in the communications industry could only have a negative effect of discouraging other honest, industrious individuals¹¹⁰ (i.e., the public) from investing in licenses and engaging in business dealings involving the communications industry. Petitioner humbly requests that the Commission fashion a remedy¹¹¹ that would discourage fraud and licensee misrepresentations and lack of candor, such as a punitive damages and/or license revocation. This objective is not accomplished by a settlement agreement that allows Preferred to pay a fine without admitting wrongdoing after it clearly made misrepresentations and lacked candor before the Commission.¹¹²

¹⁰⁸ *Niagara*, 379 F.2d at 160.

¹⁰⁹ Attached as Exhibit A. The judgment is nondischargeable as a debt for embezzlement pursuant to 11 U.S.C. 532(a)(4). It is well-known that Waugh founded Express and was its President and majority owner.

¹¹⁰ Toshiaki Saito is furthermore an upstanding citizen in the Hawai'i community, a proud retired lieutenant colonel and a former member of the Green Berets, as well as a dedicated family man.

¹¹¹ See footnote 103.

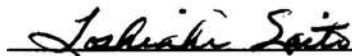
¹¹² While not perfectly analogous, Judge Rakoff's recent blocking of the settlement the SEC negotiated with Citigroup on the grounds that it was far outside the public interest is also indicative of public sentiment held by many regarding settlements that require parties to pay fines without admitting wrongdoing. *SEC v. Bank of America*, 09 Civ. 6829 (JSR). While the SEC appealed the Judge Rakoff's order to the U.S. Court of Appeals for the Second Circuit (which has not ruled yet on whether the ruling is even appealable at this time), the SEC Division of Enforcement recently altered long standing

Revoking Preferred's deceptively-acquired licenses, auctioning them to more trustworthy applicants, with a portion of the proceeds satisfying the nondischargeable debts of Preferred and its affiliated businesses, would be aligned with the Commission's quintessential demand to further the public interest and with fundamental principles of fairness and justice.¹¹³

DATED: Honolulu, Hawaii JAN 27 2012.



KEVIN W. HERRING
STEVEN R. GRAY
Attorneys for Petitioner/
Interested Party
TOSHIAKI SAITO



TOSHIAKI SAITO
Petitioner/Interested Party

¹¹³ If, on the other hand, the Commission decides to revise the settlement--perhaps by including the Waugh estate--Mr. Saito respectfully requests that satisfaction of his nondischargeable judgment, plus interest, also be included.

**ABSTRACT OF JUDGMENT FORM 363****DATE OF BIRTH AND DRIVERS LICENSE NUMBER OF SAID DEFENDANTS NOT APPLICABLE**

I, GARY FITZSIMMONS, Clerk of the District Courts of Dallas County, Texas, do hereby certify that in the District Court of the 162nd District Court of Texas, in a certain suit pending in said Court, No. DC-95-12559-I wherein

TOSHIAKI SAITO, MIYEKO SAITO, RENEE AS PLAINTIFFS
KEIKO SAITO AND JEREL KENICHI SAITO

EXPRESS COMMUNICATIONS, INC., AS DEFENDANTS
PERSONAL COMMUNICATIONS CORP.
D/B/A BLUEBONNET COMMUNICATIONS
CORP., COMPASS PCS, L.C., ORCHID PCS,
L.C., ARROW PCS, L.C., JASMINE PCS, L.C.,
COMMUNICATION MARKETING
CONSULTANTS + CORP., VESTA PCS CORP.,
RAVEN PCS CORP., CARDINAL PCS CORP.,
VERMILLION PCS CORP. AND PCC
MANAGEMENT CORP.

that said **PLAINTIFFS** recovered judgment against the said **DEFENDANTS** on the 23RD DAY OF SEPTEMBER, 1997 for the sum of \$1,111,058.73/PLUS PRE-JUDGMENT INTEREST AT THE APPLICABLE LEGAL RATE

with interest on said amounts from the 23RD DAY OF SEPTEMBER, 1997 at the rate of APPLICABLE LEGAL RATE per annum, and \$*-0- costs of suit. Said judgment is of record in Volume 1249, page 151, of Records of Said Court.

There is now still due on said Judgment \$SEE ABOVE with interest on \$STATED AMOUNTS from the 23RD DAY OF SEPTEMBER, 1997, at the rate of APPLICABLE LEGAL RATE per annum and \$*-0- costs of suit.

Given under my hand and seal Of Office at Dallas, Texas ON THIS THE 4TH DAY OF SEPTEMBER, 2007.

ATTEST: GARY FITZSIMMONS

Clerk of the District Courts, Dallas County, Texas.

By Linda Schaffer Deputy
LINDA SCHAFFER

**MAIL ATTY**No. DC-95-12559-I

IN THE
162nd District Court OF TEXAS

TOSHIAKI SAITO, ETAL
VS.
EXPRESS COMMUNICATIONS, INC..
ETAL

ABSTRACT OF JUDGMENT
ISSUED
ON THIS THE 4TH DAY OF
SEPTEMBER, 2007

GARY FITZSIMMONS
 Clerk, District Courts of Dallas County,
 Texas
 By LINDA SCHAFFER, Deputy

JASON M. ROSS
CURRAN TOMKO TARSKI
1700 PACIFIC AVE., SUITE 4545
DALLAS, TEXAS 75201
(214) 270-1400

EXHIBIT A

THE STATE OF TEXAS,

County of _____ } I, _____, County clerk of _____ County,
Texas, do hereby certify that this Abstract of Judgment was filed for record in my office on the _____ day of _____ A.D.
20_____, at _____ o'clock _____ M., and was immediately recorded in book _____ page _____ Record of Abstract of Judgments of
_____ County, Texas, on the _____ day of _____ A.D. 20_____, at _____ o'clock _____ M., and was also
at the same time entered upon the index to said Judgment Record, showing the names of each Plaintiff and each Defendant in said Judgment, and the number
of the pages of the book upon which said abstract is recorded.

WITNESS My Hand and Seal of Office this _____ day of _____ A.D. 20_____.

(L.S.)

County Clerk _____ County, Texas
By _____ Deputy.

THE STATE OF TEXAS,

County of _____ } I, _____, County Clerk of _____ County,
Texas, do hereby certify that this Abstract of Judgment was filed for record in my office on the _____ day of _____ A.D.
20_____, at _____ o'clock _____ M., and was immediately recorded in book _____ page _____ Record of Abstract of Judgments of
_____ County, Texas, on the _____ day of _____ A.D. 20_____, at _____ o'clock _____ M., and was also
at the same time entered upon the index to said Judgment Record, showing the names of each Plaintiff and each Defendant in said Judgment, and the number
of the pages of the book upon which said abstract is recorded.

WITNESS My Hand and Seal of Office this _____ day of _____ A.D. 20_____.

FILED AND RECORDED



OFFICIAL PUBLIC RECORDS

[Signature]
John F. Warren, County Clerk
Dallas County TEXAS

September 10, 2007 03:08:55 PM

FEE: \$18.00

20070325976

County Clerk _____ County, Texas
By _____ Deputy.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 07-125

In the Matter	)	EB Docket No. 07-147
)	
PENDELTON C. WAUGH, CHARLES M.	)	File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC.	)	NAL/Acct. No. 200732080025
)	
Licensee of Various Site-by-Site)	
Licenses in the Specialized Mobile	)	FRN No. 0003769049
Radio Service)	
)	
PREFERRED ACQUISITIONS, INC.)	
	)	FRN No. 0003786183
)	
License of Various Economic Area)	
Licenses In the 800 MHz Specialized)	
Mobile Radio Services)	
)	

AFFIDAVIT OF TOSHIAKI SAITO

STATE OF HAWAII)	
)	
CITY AND COUNTY OF HONOLULU	)	SS.

I, Toshiaki Saito, being first duly sworn on oath, deposes and says:

1. I have personal knowledge of and am competent to testify to the matters stated herein.
2. My interests will be substantially affected by the September 29, 2009, Settlement Agreement.
3. I respectfully request that the Commission grant my motion for leave to intervene because, as a layperson generally unaware of new proceedings brought before the Commission, I had no knowledge of the above-

mentioned proceeding until 2010, and was consequently not able to file this motion within the time prescribed by Rule 1.223(a).

4. I have read the foregoing Petition To Intervene And Revoke Licenses. I know the contents thereof, and the same are true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

Toshiaki Saito
TOSHIAKI SAITO

Subscribed and sworn to before me this
27th day of January, 2012.

15

Patricia N. Hisamoto
Patricia N. Hisamoto
Notary Public, State of Hawaii
My commission expires: March 27, 2012

Document Identification or Description: Affidavit of Toshiaki Saito

Document Date: NO DATE No. of Pages: pm N.P. #2

Name: Patricia N. Hisamoto

First Circuit

Patricia N. Hisamoto

JAN 27 2012

Notary Signature

Date

15

NOTARY CERTIFICATE (Hawaii Administrative Rules §5-11-8)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 07-125

In the Matter	)	EB Docket No. 07-147
)	
PENDELTON C. WAUGH, CHARLES M.	)	File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP)	
)	
PREFERRED COMMUNICATION)	
SYSTEMS, INC.	)	NAL/Acct. No. 200732080025
)	
Licensee of Various Site-by-Site)	
Licenses in the Specialized Mobile	)	FRN No. 0003769049
Radio Service)	
)	
PREFERRED ACQUISITIONS, INC.)	
	)	FRN No. 0003786183
)	
License of Various Economic Area)	
Licenses In the 800 MHz Specialized)	
Mobile Radio Services)	
)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing shall be duly served upon the following persons by mailing said copy, postage prepaid, first class mail, in a United States post office at Honolulu, Hawaii, on January 27, 2012, at their address of record:

Honorable Richard L. Sippel
Chief Administrative Law Judge
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Washington, D.C. 20554
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DATED: Honolulu, Hawaii; January 27, 2012.



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